What defect in the California process was so serious or what right of Carmen was abridged that was so important that Carmen has been permitted to effectively assert it in the federal courts?

What right of Carmen was violated which was so important that the federal courts, including this Court, have ignored the jurisdictional bar of 28 U.S.C. 2254 and have ignored the state procedural rule which required Carmen to raise this matter in the trial court and present it to the jury?

Indeed, this Court has sanctioned the waiver of rights guaranteed by the federal constitution, such as the right to be indicted by a fair and impartial and representative grand jury panel. See *Daniels v. Allen*, 344 U.S. 443. This Court and the various Courts of Appeals have held that many other constitutional rights can be waived by failure to assert them. See *Brown v. Allen*, 344 U.S. 443, at 503. Yet in the present case where it is conceded that Carmen had a fair trial and was denied no right guaranteed by the federal constitution he is nevertheless permitted to raise a statutory "right", and a "right" which no longer exists in the federal statutes. See Public Law 280, 1953. He is permitted to raise this question in disregard of the jurisdictional bar that he failed to use the proper procedure under state law. See *In re Carmen*, 48 Cal.2d 851.

III.

BY REFUSING TO GRANT THE PETITION FOR WRIT OF CERTIORARI THIS COURT HAS AGGRAVATED THE CONFUSION ALREADY EXISTING CONCERNING THE APPLICATION OF THE WAIVER DOCTRINE IN THE FEDERAL DISTRICT COURTS; THERE ARE NUMEROUS ADDITIONAL QUESTIONS IN DOUBT THAT WERE NOT SPECIFICALLY URGED IN THE PETITION FOR CERTIORARI.

This ruling, together with the decision in *Irvin v. Dowd*, 359 U.S. 394 (1959), fails to give the judge "even the pretense of a governing formulation to be followed."[1] The U. S. District Court's opinion, as approved by the U. S. Court of Appeals, which refuses to acknowledge the application of 28 U.S.C. 2254 and the doctrine that a person may waive a right, including constitutional rights, by his failure to raise his contention at the earliest time, creates confusion and doubt among the various District Courts in the handling of state habeas corpus cases. These decisions, together with the decision in *Irvin v. Dowd*, 359 U.S. 394 (1959), have left the U. S. District Court without any guidance as to their jurisdiction in state habeas corpus cases.

Not only is this a matter of great practical importance for the guidance of United States District Courts in the exercise of their habeas corpus jurisdiction, but also it is a problem which stands in the delicate area of federal-state relationships. This prob-

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[1] The Supreme Court, 1958 Term, Foreword, Harry M. Hart, Jr.

lem should be authoritatively determined, not left shrouded in conflict and confusion. We should not have one interpretation of 28 U.S.C. 2254 and the "waiver" doctrine in the Ninth Circuit and a different one in the other circuits.

Indeed, these cases when read in conjunction with *Brown v. Allen* and *Daniels v. Allen*, 344 U.S. 443, leave many questions unanswered, many not specifically urged in the petition for certiorari.

Is the scope of direct review by petition for writ of certiorari from the state appellate courts narrower than the scope of "review" by a federal District Court?

What is the significance of a denial of a petition for certiorari "without prejudice"?

May the U. S. District Court act, as did the District Court in Carmen's case, when the U. S. Supreme Court has apparently refused to review the State Supreme Court's decision on the basis that an adequate state ground existed for the state court's decision?

Is a California State procedural rule requiring Carmen to raise a jurisdictional matter at the time of the trial and present it to the jury an "unreasonable state procedural rule" and thus in violation of due process?

Is the failure to comply with a state procedural rule a bar to the raising of a question by habeas corpus only when the state procedural rule is reasonable or is the test one left to the discretion of the various U. S. District Courts?

Is the test as to when a person has "waived" a constitutional right different for federal prisoners than for state prisoners?[2]

Is waiver by failure to comply with state procedural rules identical with the failure to exhaust state remedies within the meaning of 28 U.S.C. 2254?

All of these questions have been created by the conflict of the District Court's opinion and the Court of Appeals' opinion and the opinions of this Court. All of these questions have been left unresolved by this Court by denying the petition for writ of certiorari.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
February 5, 1960.

Respectfully submitted,

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ARLO E. SMITH,
Deputy Attorney General of the State of California,

Counsel for Petitioner.

[2] See argument heading I.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

Dated, San Francisco, California,
February 5, 1960.

Arlo E. Smith,
Deputy Attorney General of the State of California,
Counsel for Petitioner.